STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2010
v	No. 289056 Missaukee Circuit Court
ROBERT ALLEN BAKER, Defendant-Appellant.	LC No. 08-002194-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(iv); possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v); possession with intent to deliver marijuana, MCL 333.7401(2)(d); possession of marijuana, MCL 333.7304(2)(d); maintaining a drug house, MCL 333.7405(1)(d); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to five to 25 years in prison for delivery of heroin, three years and 10 months to 15 years in prison for possession of heroin, four to 15 years in prison for possession with intent to deliver marijuana, 315 days in jail for possession of marijuana, 10 months to 15 years in prison for maintaining a drug house, 3 to 25 years in prison for felon-in-possession, and two years in prison for felony-firearm. We vacate defendant's conviction for possession of marijuana[1] but affirm in all other respects.

This case arose from a controlled buy that took place with a confidential informant (CI). The CI obtained suspected heroin and ecstasy from defendant. The police then obtained a search warrant for defendant's residence, where they found marijuana.

On appeal, defendant first argues that the trial court erroneously failed to strike certain portions of the affidavit supporting the search warrant; he argues that the portions in question were factually inaccurate. We review for clear error a trial court's findings of fact at a suppression hearing. *People v Custer*, 248 Mich App 552, 558; 640 NW2d 576 (2001).

[1] We note that defendant has already served the sentence for this offense.

At the suppression hearing, defendant challenged the inclusion of the following sentence from paragraph 6 of the affidavit: "When conducting the controlled purchase, the Confidential Informant or Under Cover Officer are under constant surveillance by detectives from the Traverse Narcotics Team." The court declined to strike this sentence, stating:

> The [c]ourt has to review – the Magistrate has to review the affidavit in a common sense framework and understanding the context in which it's taken, and it's well understood by those working in criminal justice, including magistrates who regularly review these affidavits, that surveillance is not a constant watching. And in this case, there was in fact surveillance of the CI approaching the residence; that's not contradicted. He wasn't watched while he was there, but he was under electronic surveillance; that is a common occurrence. I don't believe that portion of the affidavit misled the Magistrate in any fashion . . . .

The court also rejected, for similar reasons, defendant's challenge to paragraph 15, which also referred to "constant surveillance": "Your Affiant is aware that constant surveillance was maintained on CI #15039 to ROBERT BAKER's at 5321 S. Jeffs Rd address, and then back to the pre-determined meet spot."

Defendant contends that the trial court erred in failing to strike paragraph 15 and the sentence from paragraph 6 set forth above. We disagree. At the preliminary examination, Detective Erik Wien testified that he watched the CI until the CI got "to the end of the driveway" of defendant's house. Then, when the CI came back down the driveway, Wien again watched him until they all arrived at the "meet spot." At trial, Wien testified that he also "listened to the [audio] transmitter" during the controlled buy. Clearly, the CI was under continuous surveillance, when the audio transmission is taken into account. We find no clear error in the court's ruling.

Defendant also challenged the inclusion of paragraph 10 of the affidavit. This paragraph states:

> Your Affiant is aware that on 11/26/07 at approximately 1715 Hrs., CI #15039 made contact with ROBERT ALLEN BAKER at 5321 S. Jeffs Rd., and purchased 4 packets of suspected Heroin for $100.00 dollars, as well as 4 ecstasy pills for $40.00 dollars.

Defendant claimed that this paragraph was defective because it failed to indicate from where the affiant obtained his "awareness." The court disagreed, stating, in part:

> The [c]ourt again will indicate that you have to read the affidavit as a whole, and I believe that the allegations contained in paragraph 10 are typical allegations. Couple paragraph 10 with paragraph 18 where it indicates that the CI indicated that he or she arrived at the Baker residence, came in contact with Mr. Baker, etcetera, etcetera; indicated that they wanted them and went inside and got the heroin.

Defendant claims that the court erred and that this paragraph should have been stricken because it implies that the affiant's "awareness" came about through personal observation. We disagree.

When the affidavit as a whole is viewed in a commonsense manner, it is clear that the affiant's knowledge came about as a result of the controlled buy. No clear error is apparent.

Defendant also challenged the inclusion of paragraph 18, which stated:

> Your affiant is aware that CI #15039 indicated that he/she arrived at Bakers [sic] residence, Robert Baker then came out the [sic] his/her vehicle, and asked what he/she wanted. The CI then indicated that he/she wanted four packets, and four ecstasy pills. The CI then stated that Robert Baker went inside to get the Heroin packets, and then went to the trunk of a car in the driveway and retrieved the ecstasy pills.

Defendant indicated that the CI testified at the preliminary examination that he did not go into the house to get the heroin. The prosecutor argued that the affiant was basing the paragraph on what the CI told him, despite what subsequent preliminary examination testimony might have revealed. The court stated:

> . . . I don't find much substantial difference with the statement compared with the affiant at paragraph 18 as what was testified to at the preliminary examination. I realize what was testified to at the prelim is what the CI told the affiant, but based upon the closeness of these two recitations, the later one in the transcript being under oath in court by the CI is close enough and it doesn't lead me to believe that there's anything factually inaccurate as it relates to probable cause with paragraph 18. . . .
>
> This affidavit leads us to believe that ultimately someone came out of that house and delivered heroin outside of the house. And if I read page 68 of the transcript of the prelim which is the facts you're relying upon, Mr. Baker acting as his own counsel said that. So I came out of the house and you asked for four packets of heroin and I gave you four packs of heroin, and that I went over to my car. He had heroin on him, he came out of the house and he delivered it to somebody. I don't see that any difference [sic] between going in the house and getting it. He walked out of the house with heroin; that's the testimony at the prelim.

Defendant contends that paragraph 18 should not have been included because the fact that defendant came out of the house with heroin on his person is not the same as his having gone back into the house to retrieve heroin.

At the preliminary examination, defendant (representing himself) asked the CI about the specifics of the controlled buy. The CI testified, "you came right out with the heroin." In light of this testimony, we cannot find clear error with regard to the trial court's ruling. Given that the CI testified that defendant "came right out" with the heroin, it is a reasonable inference that heroin was stored in the house. For this reason, the statements in paragraph 18 were not substantially misleading

The statements that the trial court did strike were as follows:

> Affiant is also aware that the Confidential Informant is interviewed prior to working with the Traverse Narcotics team.
>
> Your Affiant is aware that according to STING detectives CI #15039 has conducted at least ten previous controlled purchases, with several resulting in arrests.
>
> Your Affiant is aware that a LEIN/SOS check of ROBERT ALLEN BAKER showed the following Narcotics related Criminal History, 12/14/07 Robert Baker was found guilty for Narcotic Drugs, Fraudulent procurement of.
>
> Your Affiant is aware that CI #15039 stated that Robert Baker indicated that he had more Heroin left, and was going to go and get more ecstasy later.

Defendant contends that the affidavit, without the stricken paragraphs, failed to adequately support the search warrant. We disagree.

> [R]eviewing courts should read [a] search warrant and . . . affidavit in a common-sense and realistic manner. Deference is afforded the magistrate's decision on the basis of a preference for searches conducted pursuant to warrants, and a reviewing court must only [ensure] that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place. [*People v Stumpf*, 196 Mich App 218; 492 NW2d 795 (1992).]

If material is excised from a supporting affidavit, the court must determine if the remaining allegations support a finding of probable cause. See *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

Disregarding the excised information, the affidavit indicated that the CI participated in a controlled buy and obtained four packets of suspected heroin from defendant. The CI was monitored during the controlled buy. He was searched before the controlled buy and the "purchased items" were found on his person after the controlled buy. During the controlled buy, defendant came out of the house in question with heroin.[2] We agree with the trial court that this information in itself was sufficient to support a finding of probable cause. See, generally, *People v Williams*, 139 Mich App 104; 360 NW2d 585 (1984), overruled in part on other grounds by *People v Russo*, 439 Mich 584 (1992). Indeed, it makes sense that an individual selling drugs, who came out of a house with drugs, would be storing drugs or related items in the house.

Defendant next argues that his convictions for both possession of marijuana and possession with intent to deliver marijuana violated the Double Jeopardy clauses of the United States and Michigan constitutions. See US Const, Am V, and Const 1963, art 1, § 15. We review this issue de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

[2] We are, for the sake of analysis and to give defendant the benefit of the doubt, using here the version of the events as described at the preliminary examination.

As noted in *Nutt*, the prohibition against double jeopardy "protects against multiple punishments for the same offense." *Id*. at 574. To determine whether two convictions occurred for the same offense, a court must determine whether each offense requires proof of an element that the other does not. *People v Smith*, 478 Mich 292, 300-301, 316, 318-319; 733 NW2d 351 (2007). Clearly, possession of marijuana with intent to deliver contains an element that possession of marijuana does not. However, the converse is not true: possession of marijuana does not contain an element that possession with intent to deliver does not. Therefore, if defendant was convicted of both offenses based on the same marijuana, a double jeopardy violation occurred.

With regard to marijuana, the prosecutor argued in his opening statement that "you can't deliver something or possess it with the intent to deliver it without first possessing it." In his closing argument, the prosecutor stated that defendant both "possessed" and possessed "with the intent to further distribute" the marijuana that was found in a cooler in the house. Accordingly, it is clear that the prosecutor was basing both the "possession" charge and the "possession with intent to deliver" charge on the same marijuana.[3] Under these circumstances, reversal of the possession conviction is warranted, and the prosecutor concedes as much on appeal.[4]

Defendant also argues that his convictions for both possession of heroin and delivery of heroin violated the prohibition against double jeopardy. We disagree. The law of this state *in the past* did prohibit a conviction for both possession and delivery of heroin, if the same heroin was used to support both offenses. See *People v Wakeford*, 418 Mich 95, 109; 341 NW2d 68 (1983). The Supreme Court later disavowed the analysis from the earlier cases, however, and indicated that the double-jeopardy question is to be resolved merely by setting forth the test from *Smith*, 478 Mich 292, 300-301, 316, 318-319. See *Wakeford*, 418 Mich 108-111. Possession of a controlled substance is not a necessarily included lesser offense of delivery. See *People v Binder*, 215 Mich App 30, 35; 544 NW2d 714 (1996), vacated in part on other grounds 453 Mich 915 (1996). Therefore, possession and delivery each contain an element that the other does not. The *Smith* test is satisfied, and defendant's convictions did not violate double jeopardy principles.

Defendant next argues that there was insufficient evidence for the jury to convict him on the charge of maintaining a drug house, MCL 333.7405(1)(d). We review challenges to the sufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must determine if, considering the evidence presented, a rational trier of fact could have found guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We must view the evidence in the light most favorable to the prosecutor. *Herndon*, 246 Mich App 415. "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

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[3] There was evidence of additional marijuana in the house, aside from that found in the cooler.

[4] The prosecutor admits that if "the People are bound by the prosecutor's theory at trial that defendant possessed the marijuana before he delivered it . . . the People agree that defendant's conviction for possession of marijuana must be vacated."

MCL 333.7405(1)(d) states that a person:

> [s]hall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

In *People v Thompson*, 477 Mich 146, 154-157; 730 NW2d 708 (2007), the Court stated that for a proper conviction under this statute, the prosecutor must show some "evidence of continuity" with respect to the drugs. Here, contrary to defendant's assertion, there was indeed evidence of continuity. The police found a cooler containing 11 baggies of marijuana in the house. They were packaged as if for sale. Also found in the house were numerous guns and a set of digital scales. Also in the house was a silver spoon burned at the bottom, similar to other spoons the police knew had been associated with heroin use. The money from the controlled buy was found in the house, along with an additional $234, and additional marijuana was found behind a dresser. Moreover, Detective Wier testified that defendant told him that he "would go down to the Detroit area to get heroin for personal use" if he could not get access to methadone. Finally, the controlled buy was introduced into evidence. We find that this evidence, viewed as a whole, was sufficient to show a degree of continuity, and reversal is therefore unwarranted.

Defendant next argues that his right to confront his accusers was violated because the CI did not testify at trial, yet portions of his prior statements were admitted at trial. We review issues of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

On the first day of trial, the court found that the prosecutor had established due diligence in attempting to locate the CI. However, it refused the prosecutor's request to admit the CI's preliminary examination testimony, finding that the proceedings at the preliminary examination were different enough from the expected proceedings at trial that to admit the preliminary examination testimony would violate defendant's right of confrontation. The court later stated that it would determine, when the need arose, whether any possible portions of the CI's statements could later be admitted.[5]

On direct examination, Deputy Dean Maeder testified that he came into contact with Detective Wien regarding a possible sting operation. Defendant argues that, in the course of his testimony, Maeder testified that the CI informed him about the possible drugs and that therefore Maeder's testimony constituted hearsay. This is simply not true. When asked why Maeder had a meeting with Wien, Maeder stated, "I had contacted Detective Wien with information that narcotics could be purchased off of Jeffs Road." Maeder did not reveal who provided him this information. Given the lack of objection, this issue is subject to review under the plain-error

[5] Defendant is incorrect when he argues at page 11 of his supplemental brief that the court ruled that "no statements of the [CI] would be admitted in this case."

doctrine. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). There is no clear or obvious error apparent. *Id*. at 763.

Detective Maeder's partner, Officer Ryan Finstrom, testified on cross-examination that the sting operation was focused on heroin and ecstasy. Defendant (acting as his own counsel) attempted to elicit that marijuana was not a target of the operation. He asked, "is it a reasonable conclusion that there was not information pertaining to a possible marijuana buy?" Finstrom responded, "No, there wasn't. The CI stated he was going to purchase ecstasy and heroin." Defendant now objects to this unsolicited statement by Finstrom.

There was no objection at trial to this unsolicited statement, and thus review is once again under the plain-error doctrine. *Id*. at 763-764. We find no clear or obvious error. Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Clearly, Finstrom's statement was not used to "prove the truth of the matter asserted." Instead, he was attempting to answer defendant's question regarding whether the sting operation was targeting marijuana.

Detective Wien testified as follows when the prosecutor asked about his activities before the sting operation:

> I had received a call earlier in the day, it was right around noon I believe, from a detective from STING, Detective Maeder. Detective Maeder indicated that he had a confidential informant that could purchased [sic] heroin and possibly –

At this point defendant objected, and the court stated, "Yeah, it is hearsay. I'll sustain the objection." The colloquy does not make clear whether the objection and ruling was based on the out-of-court statement of Detective Maeder or the "statement" by the CI. However, on appeal, defendant focuses solely on the "statement" of the CI and claims that it violated his right of confrontation. However, we find no error. Wien's testimony was that Maeder "had a confidential informant that could" purchase heroin. Wien did not testify regarding a "statement" by the CI as defined in MRE 801(c). Even if the information could be characterized as a "statement," it was not offered to prove the truth of the matter asserted but merely to indicate why the sting operation was set in motion.

Because none of the "statements" identified by defendant in his appellate brief constituted hearsay, we need not analyze whether the statements were "testimonial" in nature as defined in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant next argues that his right of confrontation was violated when the jury listened to an audio recording of the controlled buy.

During Detective Wien's testimony, an audio recording of the controlled buy was played for the jury. The tape was stopped in mid-play, and the court then, out of the presence of the jury, expressed concern that the end of the recording might contain statements by the CI to Wien. Wien stated the following when the court asked whether there was a discussion between him and the CI on the recording: "There is, your Honor. It's brief. I received it back and then shortly thereafter shut it off, but I do specifically ask about the pills. I walk up and say did you get four

pills, and he indicated yes, he did." Defendant stipulated on the record that the remainder of the tape involved the CI stating to Wien that he "got [the pills]."

During jury deliberations, the jury listened to the entire recording. The court instructed the jury to disregard the portion of the recording concerning events after the completion of the controlled buy. The court stated that "[i]t is not evidence in the case, and you should disregard it."

We conclude that, even if the discussion in question is deemed to contain hearsay, reversal is unwarranted. An error of constitutional magnitude is harmless if there is no reasonable possibility that the error might have contributed to the conviction. *People v Smith*, 249 Mich App 728, 730; 643 NW2d 607 (2002). There is no reasonable possibility here that the error might have contributed to the conviction. Detective Wien testified that he searched the CI before the controlled buy and that after the controlled buy the CI had four suspected ecstasy pills and four packets of suspected heroin. This testimony established that the CI obtained drugs, and the colloquy at the end of the audio recording was merely cumulative. Moreover, we note that the trial court gave an appropriate cautionary instruction regarding the information on the audio recording; this further lessened the impact of the recording. We also note, as discussed further *infra*, that the trial court granted a directed verdict with regard to the "pills" at issue during the controlled buy.

Defendant further objects to a statement on the audio recording during which the CI states, "Oh, I just got cut off," arguing that this statement was made to the police by the CI and therefore was testimonial in nature and violated defendant's right of confrontation. This argument is patently without merit, because the inclusion of this "statement" in the recording was clearly harmless.[6]

Defendant next argues that the trial court erred in admitting evidence relating to the felon-in-possession charge. We review the admission of evidence for an abuse of discretion. *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009).

Defendant was charged with being a felon in possession of a firearm, MCL 750.224f. The basis for the charge was defendant's conviction in March 2007 for possession of less than 25 grams of cocaine. At trial, defendant stated that he was on probation for that offense and requested that that fact not be disclosed to the jury because of its prejudicial effect. The court replied:

> The statute itself indicates that a person is not eligible and would be guilty of this crime under MCL 750.224(F) [sic] if this possession of a firearm occurs within three years of a person completing their probation. The fact that you are

[6] Defendant also appears to be objecting to the CI's statements of "four, four" and "got any pills left?" on the tape. Once again, we cannot find that these statements fit within the definition of "hearsay" in MRE 801(c). Also, as noted later in this opinion, the trial court granted a directed verdict with regard to any "pills."

> still on probation is an element of the offense, and I'm going to permit the prosecution to present that evidence.
>
> On appeal, defendant argues:
>
> > Thus, defendant now maintains the trial [c]ourt abused its discretion and denied him a fair trial and due process of law by admitting his conviction for possession of less than 25 grams of cocaine and his probation agent's testimony that he was still on probation for that offense where Defendant offered to stipulate to being a felon to establish that element but requested the specific charge and the fact that he was on probation not be admitted.

However, defendant misrepresents his request to the court. He merely requested that the fact *of his being on probation* not be disclosed to the jury; he did not request that "the specific charge . . . not be admitted." While a court's refusal to accept a proper stipulation to having been convicted of a felony for purposes of MCL 750.224f may indeed be an abuse of discretion, see *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997), defendant's arguments at trial in this case simply related to the fact of his probation. Accordingly, we find no basis for reversal. Indeed, if the jury was being informed of the nature and date of the prior conviction, we fail to see how defendant's having still been on probation for the offense would have substantially increased any prejudicial effect of the information.

Defendant also argues that the trial court applied the wrong standard under MCL 750.224f because the prior conviction was actually a "specified felony." MCL 750.224f states:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (2) *A person convicted of a specified felony* shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (i) The person has paid all fines imposed for the violation.
>
> (ii) The person has served all terms of imprisonment imposed for the violation.

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.

(3) A person who possesses, uses, transports, sells, purchases, carries, ships, receives, or distributes a firearm in violation of this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or a fine of not more than $5,000.00, or both.

(4) This section does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm.

(5) As used in this section, "felony" means a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for 4 years or more, or an attempt to violate such a law.

(6) As used in subsection (2), "specified felony" means a felony in which 1 or more of the following circumstances exist:

(i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(ii) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.

(iii) An element of that felony is the unlawful possession or distribution of a firearm.

(iv) An element of that felony is the unlawful use of an explosive.

(v) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson. [Emphasis added.]

We agree with defendant that the trial court, in ruling on defendant's "probation" objection, failed to recognize that a "specified felony" as defined in the statute was at issue here. However, this error in no way affected the outcome of the trial. Indeed, the court later corrected itself and cited the proper subsection. Therefore, reversal is not required.

Defendant next contends that he received ineffective assistance of counsel from his advisory attorney.[7] Because defendant failed to raise this issue in a motion for a new trial or request for a *Ginther*[8] hearing, our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the Constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct is sound trial strategy and must further show that he was prejudiced by the error in question (i.e., demonstrate a reasonable probability that but for counsel's error the outcome of the proceedings would have been different). *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant must also demonstrate that the proceedings were fundamentally unfair or unreliable. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). If counsel's conduct involved a choice of strategies, it was not deficient. *LaVearn*, 448 Mich at 216. In evaluating an ineffective assistance claim, every effort must be made to eliminate the effects of hindsight. *Id*.

Defendant first argues that counsel should have moved for a directed verdict on two counts of the information as soon as it became clear that the confidential informant's testimony would not be allowed at trial.

Although defendant was originally charged with two counts relating to ecstasy pills, these charges were later amended to reflect an "imitation controlled substance" under MCLA 333.7341(3), after the pills at issue were shown to not contain ecstasy. At the close of the prosecutor's proofs, defense counsel argued that no evidence had been presented that defendant possessed or delivered an "imitation controlled substance." The trial court agreed, finding that there was simply insufficient evidence for the jury to conclude that defendant represented the pills in question as ecstasy.

We find no basis for reversal with regard to counsel's actions because he did in fact move for a directed verdict and was successful in his motion. Any failure to move earlier for a directed verdict did not affect the outcome of the case. *LaVearn*, 448 Mich 216. We cannot conclude that the mention of ecstasy during the prosecutor's case significantly prejudiced defendant with regard to the remaining counts.

Defendant next argues that counsel was ineffective in failing to file a motion offering to stipulate that defendant was ineligible to possess a firearm under MCL 750.224f. We agree that defense counsel acted inadequately in this regard. However, given the clear evidence supporting defendant's convictions in this case, we cannot conclude that the outcome of the trial was affected by the jury's hearing that defendant had the prior conviction and was on probation for it at the time of the present offenses. Accordingly, reversal is unwarranted. *LaVearn*, 448 Mich 216.

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[7] Defendant represented himself at trial but had an advisory attorney.

[8] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Defendant next argues that defense counsel was inefficient in failing to object to paragraph 18 of the affidavit supporting the search warrant. Defendant's argument is nonsensical because defense counsel clearly and emphatically *did* challenge paragraph 18 at the suppression hearing. It appears that defendant is now taking issue with the trial court's finding at the suppression hearing that defendant himself stated, at the preliminary examination, that he "came out [with the] heroin." The court stated:

> This affidavit leads us to believe that ultimately someone came out of that house and delivered heroin outside of the house. And if I read page 68 of the transcript of the prelim which is the facts you're relying upon, *Mr. Baker acting as his own counsel said that*. [Emphasis added.]

Defendant claims that in saying, at the suppression hearing, that he "came out" with the heroin, he was merely repeating the CI's earlier testimony while phrasing a question. He claims that defense counsel thus should have objected to the trial court's conclusion that defendant himself admitted to coming out with heroin. However, the CI clearly testified that defendant came out of the house with the heroin. Therefore, any "evidence" provided by defendant himself was merely cumulative. Defense counsel's failure to object certainly did not affect the outcome of the proceedings. *Id*.

Defendant next argues that the trial court erred in permitting defendant's retained counsel to withdraw from the case. We review for an abuse of discretion a trial court's decision concerning a motion to withdraw. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999).

On April 4, 2008, attorney Burton Hines filed a motion to withdraw as counsel. He stated in his motion that defendant insisted on being designated as a "co-counsel" in the case but later wanted Hines to be merely a back-up attorney. He stated that defendant wrote a letter directly to the court expressing his dissatisfaction with Hines's conduct. Hines concluded, "[f]or the above reasons and for additional reasons (the disclosure of which may violate attorney-client privilege) there exists an irrevocable breakdown in the attorney-client relationship." In defendant's letter to the court, defendant stated that Hines was refusing to help him obtain medical records of the CI.

At the hearing on the motion to withdraw, the prosecutor noted that "this would be the dismissal of the third attorney for Mr. Baker." Defendant then stated, "He's asking to withdraw, and what happens to his retainer?" The court stated that that was a contractual matter between defendant and Hines. Defendant then stated, "Well with that in mind because he did not suggest anything, I object to his motion and his withdrawal. I think that my complaints are valid . . . . But he was not doing what he agreed to do when he was hired, and I felt that I must speak out." The court ruled:

> As it relates, Mr. Baker, to your financial arrangement with Mr. Hines, that's between the two of you. Mr. Hines is a very experienced attorney, and I'm certain he will follow the rules of ethics for attorneys in dealing with the obligation to return fees if he withdraws from the case. Based on his motion and the attachments that reference to your correspondence [sic] regarding Mr. Hines'

> conduct and his representation in his motion that your relationship has broken down, I'm going to grant Mr. Hines' motion to withdraw.

We find no abuse of discretion. Defendant was clearly dissatisfied with Hines's performance and wrote a letter to the court expressing as much. Hines indicated that there had been an irrevocable breakdown in the attorney-client relationship. In objecting to the withdrawal, defendant appeared to be motivated by thoughts of what would happen to the retainer he had paid, and he continued to indicate that Hines had not performed as he wished him to perform. Under the circumstances, the court acted properly in allowing the withdrawal.

Defendant also mentions that Hines failed to follow the court rules because the motion hearing took place too soon after the filing of the motion and because Hines failed to set forth adequate legal authority regarding his motion to withdraw. Defendant, however, did not raise these issues in the trial court. Defendant gave no indication below that he was not able to adequately prepare for the motion, nor did he indicate below that the motion was somehow defective. For these reasons, we decline to address these issues. *People v Marji*, 180 Mich App 525, 534; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896 (1991).

Defendant lastly argues that reversal of his conviction is required because of cumulative error. We disagree. Most of defendant's allegations of error are utterly without merit, and any irregularities that did occur did not result in an unfair trial. See *People v Smith*, 363 Mich 157, 164; 108 NW2d 751 (1961).

Defendant's conviction for possession of marijuana is vacated; we affirm in all other respects.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray